FILE COPY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946.

## No. 970

BROTHERHOOD OF RAILROAD TRAINMEN,
AN UNINCORPORATED ASSOCIATION,
*Appellant,*

*vs.*

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PERE MARQUETTE RAILWAY COMPANY, AND WABASH RAILROAD COMPANY,
*Plaintiffs-Appellees,*

INTERSTATE COMMERCE COMMISSION,
*Intervening Plaintiff-Appellee,*

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, AND THE NEW YORK CENTRAL RAILROAD COMPANY,
*Defendants-Appellees.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

## APPELLANT'S REPLY BRIEF.

BURKE WILLIAMSON,
JACK A. WILLIAMSON,
*Attorneys for Appellant,*
39 South La Salle Street,
Chicago 3, Illinois.

ADAMS NELSON & WILLIAMSON,
*Of Counsel,*
39 South La Salle Street,
Chicago 3, Illinois.

May 3, 1947.

# INDEX.


PAGE

Reply to Plaintiffs' Statement of the Case ..... 1

Priority in Time as between Collective Bargaining Agreement and Commission Order ..... 4

Reply to Plaintiffs' Argument:

Reply to Section I of Brief ..... 7

Reply to Section II of Brief ..... 8

Reply to Section X of Brief ..... 9

Reply to Sections III-V of Brief ..... 11

Reply to Section VI of Brief ..... 13

Reply to Section VII of Brief ..... 14

Reply to Section VIII of Brief ..... 16

Reply to Section IX of Brief ..... 17

Conclusion ..... 22


## Table of Authorities.

*Cases.*


Baltimore & Ohio R. Co. v. Chicago Junction Ry. Co., 156 F. (2d) 357 ..... 13, 14

Brotherhood of Railroad Trainmen v. Toledo, Peoria & Western Railroad Co., 321 U. S. 50 ..... 20

Gulf, Mobile & Northern Railroad Company v. Illinois Central Railroad Company, 21 F. Supp. 282 (D. C. Tenn. 1937, appeal dismissed by stipulation in 109 F. (2d) 1016) ..... 12, 13

International Brotherhood v. Keystone Freight Lines, 123 F. (2d) 326 (10th Cir. 1941) ..... 16, 17

Lee Way Motor Freight, Inc. v. Keystone Freight Lines, Inc., 126 F. (2d) 931 (10th Cir. 1942) Certiorari denied 317 U. S. 645 ..... 19

Southeastern Motor Lines, Inc. v. Hoover Truck Co., Inc., et al., 34 F. Supp. 390 (D. C. Tenn. 1940) ..... 19

United States v. California Canneries, 279 U. S. 553 ..14, 15

United States v. Fisher, 2 Cranch 358 ..... 9

United States v. United Mine Workers of America (L. ed. Advance Opinions, 91 L. ed. 595), 67 S. Ct. 677 ..20, 21

Virginian Ry. Co. v. System Federation, 300 U. S. 515. 20

*Statutes.*

Interstate Commerce Act:

Part I,

Section 5 (2) (f) (49 USCA Chap. 1, Sec. 5 (2) (f)) (54 Stat. L. 906) ..... 4, 11

Section 16 (12) (49 USCA Chap. 1, Sec. 16 (12)) ..... 20

Section 17 (11) (49 USCA Chap. 1, Sec. 17 (11)) (54 Stat. L. 916) ..... 9

Part II,

Motor Carrier Act (49 USCA Chap. 8) ..... 19

Judicial Code:

Sections 212, 213 (28 USCA Sec. 45a) ..... 10, 21

Norris-LaGuardia Act (29 USCA Secs. 101-115) ..... 18, 19

Railway Labor Act:

Section 2, Ninth (45 USCA Sec. 152) ..... 20

*Rules.*

Rules of Civil Procedure for District Courts of the United States:

Rule 24 (a) (1) (2) ..... 8, 9

Rule 65 (d) ..... 3, 17

Rule 65 (e) ..... 3

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946.

---

**No. 970**

---

BROTHERHOOD OF RAILROAD TRAINMEN,
AN UNINCORPORATED ASSOCIATION,
*Appellant,*

*vs.*

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PERE MARQUETTE RAILWAY COMPANY, AND WABASH RAILROAD COMPANY,
*Plaintiffs-Appellees,*

INTERSTATE COMMERCE COMMISSION,
*Intervening Plaintiff-Appellee,*

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, AND THE NEW YORK CENTRAL RAILROAD COMPANY,
*Defendants-Appellees.*

---

ON APPEAL FROM THE DISTPICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

---

## REPLY TO PLAINTIFFS' STATEMENT OF THE CASE.

---

Plaintiffs in their brief, page 3, characterize our Statement of the Case as "incomplete, misleading and wholly inadequate" to an understanding of the questions raised

by the appeal. Then follows fifteen pages of Statement of the Case with facts purporting to be shown in various court documents on file (Br. 3-17). It would serve no purpose here to review our Statement of the Case, inasmuch as plaintiffs point to no inaccuracy therein, and do not state wherein our statement is incomplete, misleading or inadequate. We shall merely mention here, as briefly as possible, certain incorrect statements made by plaintiffs.

On page 6 of their brief, plaintiffs state that from 1922 to the present time the New York Central has had "control of the traffic and operating relationships existing between the Junction and the River Road on the one hand, and the plaintiffs, respectively, on the other hand." This statement was taken from paragraph 12 of plaintiffs' complaint (R. 6).

On page 8 of their brief, plaintiffs state that the Stipulation of Facts (R. 50-55) admitted as true the "facts above outlined" by plaintiffs from the allegations of the complaint.

This is not correct. The allegation of plaintiffs as to control by the New York Central of traffic and operating relationships is categorically denied by the Central and the River Road in their answer (R. 82, 84), and as to the Junction, the stipulation merely states it has had no traffic or operating relationships whatever since 1922 (R. 57).

The materiality of this point of fact is obvious at a trial on the merits, since the condition in the Commission order sued on only required continuance of such traffic and operating relations as were within the control of the New York Central (R. 53). If plaintiffs wish to argue, as a conclusion of law, that such traffic and operating control follows stock ownership, of course they may do so. But

plaintiffs should not describe their contention as a stipulated fact. So far as this appeal is concerned, we doubt its materiality, and we have not noted any further reference to the matter by plaintiffs.

Also on page 6 of plaintiffs' brief, it is stated that the report of the Commission accompanying its order of May 16, 1922 referred to the practice of allowing plaintiffs to use River Road tracks with their own power "and crews", as the only practical method of handling livestock other than hogs and sheep. As we previously pointed out at page 3 of our brief in opposition to the motion of plaintiffs to dismiss, the paragraph of the report referred to by plaintiffs mentioned only the "own power" of plaintiffs, and not their "own power and crews" (R. 15). We have also pointed out that the Commission report makes no distinction between cattle on the one hand, and hogs and sheep on the other (Appellant's brief, page 9; R. 15).

On page 9 of plaintiffs' statement of facts it is declared that the preliminary injunction which was issued in this case followed substantially in form and scope the provisions of Rule 65 (d) of the Rules of Civil Procedure. This is argumentative and has no place in a statements of facts. It cannot be taken as an answer to our argument (Appellant's brief, page 30) that Rule 65 (e) makes Rule 65 (d) inapplicable to statutory provisions relating to injunctions in "actions affecting employer and employee."

On page 16 of their brief, plaintiffs state that the Brotherhood in its motion to intervene charged that the defendants "made no formal objection" to the preliminary injunction. The fact is the precise opposite. The Brotherhood charged that the defendants made *only* formal objection to the injunction (R. 96).

In view of plaintiffs' above inaccuracies and their failure to point out any error or omission in our Statement

of the Case, we feel justified in concluding that it is adequate for purposes of this appeal.

**Priority in Time as Between Collective Bargaining Agreement and Commission Order.**

The relative dates of the collective bargaining agreement between the River Road and its trainmen (Chicago Memorandum of Agreement) and the order of the Interstate Commerce Commission which is sued on are important only because plaintiffs have laid such great stress (Br. 26-35) on their contention that the order came first and that the agreement therefore must fall.

Our position is that the contract is not violative of the order; that regardless of when the contract was made it establishes an interest of the employees in the subject matter of this suit; and that under Section 5 (2) (f) (effective in 1940) of the Interstate Commerce Act, pertaining to transactions between carriers requiring Commission approval, it is expressly provided that an agreement pertaining to the protection of the interests of employees "may hereafter" be made by a carrier and its employees. This provision is effective "notwithstanding any other provision" of the Act, and it clearly authorizes the settlement interpretation of the Chicago Memorandum of Agreement, made January 23, 1946, irrespective of the date when either was made in relation to the Commission order.

However, since the plaintiffs insist that the facts in the record support their contention that the Commission order of May 16, 1922 antedated the collective bargaining agreement, and have contended that the latter did not come into existence between the River Road and its trainmen until some unspecified time after October 1, 1937 (Br. 14-16), we feel that a discussion of this purely factual point is warranted.

The collective bargaining agreement under which the employees worked (R. 103) is entitled "The Chicago Memorandum of Agreement" (R. 106). Among the nineteen railroads represented in the Agreement was "Chicago Junction Railroad" (R. 106). The Agreement was to remain in effect until revised or abrogated (R. 116). The Agreement was signed for the Brotherhood of Railroad Trainmen on December 20, 1919 and was to become effective as to some rules in 1919 and as to the remaining rules in 1920 (R. 118, 124).

Prior to May 19, 1922 the Junction operated a switching road "in conjunction with a connecting switching line owned and operated by the River Road" (R. 56). When the River Road leased the Junction properties on May 19, 1922 the River Road "took over the personnel of the Junction, except a few of its officers, and since that time the said properties so leased have been operated solely by the River Road under the name and caption of 'Chicago Junction Railway, Chicago River and Indiana Railroad Company, Lessee'" (R. 56, 57). The Junction has never operated its properties since May 19, 1922, and its entire personnel consists of three officers (R. 57). In its report of May 16, 1922 the Commission recited that for the purpose of switching charges, "the Junction and River Road shall *continue to be treated as a single line to the same extent as at present*" (emphasis supplied) (R. 22). The collective bargaining agreement to which the Brotherhood and the River Road were parties was the Chicago Memorandum of Agreement (R. 85).

In the relations between the River Road and its employees the carrier was sometimes described as "Chicago Junction Railway (C. R. I. R. R. Co. Lessee)" (R. 90). A representative of the employees referred to it in the present proceedings as "Chicago River and Indiana Rail-

road Company, lessee of the Chicago Junction Railway Company" (R. 70).

The following language appears in Article 1 of the Chicago Memorandum of Agreement (R. 107):

> "Note—Revised rates of pay, effective October 1, 1937, and rate of pay for car retarder operator added to original agreement."

Other notes concerning revisions as to rates of pay effective in 1926 and 1927 appear in the Chicago Memorandum of Agreement (R. 118).

Finally, the letterhead used in making the settlement agreement of January 23, 1946 clearly indicates the joint identity of Chicago Junction Railway and the River Road. This letterhead is as follows (R. 88):

> "Chicago Junction Railway
> (The C. R. & I. R. R. Co., Lessee)
> The Chicago River & Indiana Railroad Company"

In the settlement agreement trainmen are described as "C. J. Crews" (R. 88). Plaintiffs stipulated that this settlement agreement "provided that said work of moving and switching cars be given to River Road trainmen" (R. 56).

It is obvious from this recital of facts that employees of the Chicago Junction made a collective bargaining agreement with their employer on December 20, 1919; that when the Commission on May 16, 1922 authorized the River Road to take over the Chicago Junction, Junction employees became River Road employees and continued this agreement in the name of the Chicago Junction; and that the River Road employees still continue to do so.

## REPLY TO PLAINTIFFS' ARGUMENT.

### Reply to Section I of Brief.

In pages 22-23 of their brief plaintiffs argue that an indispensable party has no right to intervene on the ground that he is an indispensable party; that this is a question which may properly be brought up only by existing parties or by the court. All that we are able to make of this argument is that the conventional properties might best be served if the absent party allowed someone else to note his absence before making his appearance. As we pointed out in our brief, page 17, this was done first by the defendants (R. 77) and then by the Brotherhood on its motion to file a special appearance for this purpose (R. 67). Surely plaintiffs do not mean that an applicant for intervention must show any greater interest in the litigation than that he is an indispensable party. Of course, once the party applies for general intervention, his absence is no longer a live question, but it does not follow that a showing of indispensability as a party is improper, even though it may be far more than is needed to allow intervention of right. We are willing to concede that a showing of indispensability more than states a claim to intervention of right. The highly important point, which is apparently overlooked by plaintiffs, is that when the intervenor has such an interest in the litigation that he is an indispensable party, former action taken by the court in his absence obviously cannot bind him.

## Reply to Section II of Brief.

In pages 24-26 of their brief, plaintiffs argue that Rule 24(a) of the Rules of Civil Procedure, providing for intervention of right in certain cases, presupposes that the applicant for intervention has a direct interest in the issues. We can agree with this statement, so long as it is not construed as a limitation on a right of intervention which is unconditionally provided by Federal statute. When Federal statutes do so provide, any requirement of interest must be held to have been satisfied, although plaintiffs are apparently unwilling to acknowledge even this. Rule 24(a) does not and cannot require that the applicant show, in addition to his right under the statute allowing intervention, an interest in the case which would entitle him to intervene without the benefit of the statute.

To avoid any such interpretation is undoubtedly the purpose and inevitable effect of stating sub-divisions (1) and (2) of Rule 24(a) in the disjunctive, so that an applicant shows the right of intervention who can identify himself under sub-division (1) as a person whose intervention is unconditionally provided by Federal statute, "*or*" that under sub-division (2) he has an interest which is or may be inadequately represented by other parties, and that he is or may be bound by the judgment. Plaintiffs evidently believe that both these sub-divisions of the Rule must be satisfied in order to make out a case for intervention of right. They so state elsewhere in their brief (page 53):

> "Whether appellant is entitled to intervene as of right depends solely upon whether it has alleged in its pleadings facts sufficient to establish such right under Rule 24 (a) (1) *and* (2) of the Rules of Civil Procedure" (emphasis supplied).

## Reply to Section X of Brief.

In Section X of their brief (pages 65-69) plaintiffs argue that the two Federal statutes relied on by the Brotherhood as requiring allowance of its application for intervention under Rule 24 (a)(4) are inapplicable. It is curious that an issue so crucial as this one is to the appeal should be removed from the logical place it had in appellant's brief and given such deferred treatment in plaintiffs' brief. We shall take the liberty of making our reply here.

The first statute relied on by the Brotherhood is Section 17 (11) of the Interstate Commerce Act, (54 Stat. L. 916) reading as follows:

> "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this Act affecting such employees."

Plaintiffs do not question the fact that this is a proceeding arising under the Interstate Commerce Act. Nor do they claim that any one of the above words used in the statute is lacking in perfect clarity. Yet plaintiffs say that the above quoted provision refers only to Commission hearings, and not to court proceedings (Br. 66-67). Their contention is founded solely on the fact that the phrase "Commission procedure" appears in the sub-title of this section, and that the above provision has thereby been so restricted that it cannot apply to court proceedings arising under the Act. We demonstrated in our brief (page 28) that the long established rule of construction in such cases is that the title of an act cannot control plain words in the body of the statute. *United States* v. *Fisher*, 2 Cranch 358. Plaintiffs make no mention of this case, although it plainly rejects the construction contended for by them.

Plaintiffs' only other contention in connection with this statutory provision is that even if it does provide for intervention in court proceedings as well as those before the Commission, it is unavailing to the Brotherhood because there has been no showing that this suit "affects" River Road employees, as required by this statute (Br. 68). This argument is best answered on page 53 of plaintiffs' brief, wherein they state that River Road trainmen are and will be "bound by the preliminary injunction issued in this case and will also be so bound by any like permanent injunction which may be issued."

The second statute relied on by the Brotherhood in its application for intervention of right is in the Judicial Code, Sections 212, 213 (28 U. S. C. A. Sec. 45a). It is quoted in substantial part in our brief (pages 24-25) and it is set out in full in the appendix to plaintiffs' brief. The portion particularly pertinent here is as follows:

> "• • • associations • • • who are interested • • • in any suit which may be brought by any one under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission may intervene in said suit or proceeding at any time after the institution thereof • • •"

Except for a faint intimation that this suit may not be one "relating to action" of the Commission, plaintiffs' only argument against the applicability of this statute to our case is the same as made against the Interstate Commerce Act provision above discussed: that the intervenor must have an "interest," and that none has been shown. As before, plaintiffs argue that the "interest" intended is that which would require allowance of the application under "the general doctrines of intervention." We have previously shown that this argument merely amounts to an assertion that these two statutes, although they obviously purport to confer the right of intervention, do not accom-

plish any such purpose in that any applicant for intervention who relies on them must also show that he is entitled to intervene, without the aid of the statutes, under the "general doctrines of intervention." We are confident that no authority will be found to support the notion that statutes allowing intervention should, so far as possible, be construed to mean nothing.

If by naming River Road employees as persons to be enjoined, the plaintiffs have not identified these employees as persons "affected" by this suit and "interested" in it within the meaning of these statutes providing for intervention of right, then Section 5 (2)(f) of the Interstate Commerce Act unmistakably shows that the trainmen's collective bargaining agreement provides them with such an interest as is entitled to the protection of intervention in suits such as this. That is the section of the Act from which is derived the authority of the Commission to enter the order involved here. It now contains the following provision:

> "Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees." (54 Stat. L. 906.)

## Reply to Sections III-V of Brief.

In pages 26-42 of their brief plaintiffs argue that the Brotherhood could not acquire rights under their collective bargaining agreement which "would nullify or render unenforceable" the order of the Commission. Of course this assumes that no interpretation of the order other than that contended for by plaintiffs can even be heard, and that it has therefore been determined already that a violation

exists. Ironically, plaintiffs do concede (Br. page 39) that an issue in the case concerning the order is "whether it has been violated." They also acknowledge that the defendant carriers and the Brotherhood have denied that a violation exists (Br. 12, 38). These matters have been ignored in these sections of plaintiffs' brief, and they have again fallen into the error, as they did in previous briefs submitted on this appeal, of assuming not merely that the order and the bargaining agreement are in hopeless conflict with each other, but that any suggestion to the contrary is unthinkable and must not be permitted to be made. This, as we have previously pointed out, is an attempt to try the case backwards by assuming that it has already been decided on its merits, *i. e.*, that the order has been violated and that the trainmen, who stand convicted *in absentia*, are intruders in court when they seek to plead not guilty.

The question raised on this appeal is not whether the Commission order has been violated by the trainmen's bargaining agreement, but whether the trainmen, being the principal parties charged with the alleged violation, shall have the right to defend themselves. We do not consider it necessary to discuss all the cases cited by plaintiffs to the effect that a Commission order may not be collaterally attacked. But we note that plaintiffs have attempted in this part of their brief (pages 33-35) to distinguish the case of *Gulf M. and N. Co. v. Illinois Central*, 21 F. Supp. 282, cited in our brief (page 31) on the point of inadequacy of representation. In so doing, plaintiffs make this statement:

> "There [in the *Gulf* case] the order made no reference to the use of crews, whereas here [in our case] all operating arrangements, including particularly the method of handling the cars here in question, were required to be continued in effect." (Br. page 34.)

In our case neither the Commission order and report (R. 12-37), nor its conditions (R. 22-25) require the use of particular crews in the performance of the disputed work. Moreover, the above statement by plaintiffs is in error as to the *Gulf* case, because there the report of the Commission, which was made part of its order, specifically referred to the fact that the Gulf company used its own engines while operating on Illinois Central tracks "and in charge of its own employees" (21 F. Supp. at page 289).

**Reply to Section VI of Brief.**

In pages 42-44 of their brief, plaintiffs contend that the trainmen have failed to show that they will be sufficiently damaged by the injunction to warrant their intervention. This argument is based on the theory that although the River Road trainmen say the injunction deprived them of work they were doing when the suit was started, they do not also allege that they are not otherwise employed on a full time basis, and that they therefore fail to show that they could do the work in question if they were permitted to do so. It hardly seems necessary to say that the cases cited by plaintiffs in this section of their brief do not support the proposition that the right to work under an employment contract is ordinarily a thing of no value, and that it may therefore be enjoined without harm to the worker unless he affirmatively shows peculiar circumstances of damage. If on a later trial on the merits plaintiffs can show any facts in mitigation of damages it will be to their advantage to do so.

Plaintiffs advanced an argument in this same general vein in their defense of the appeal by the Junction from the temporary injunction issued against it in this case. *Baltimore and O. R. Co.* v. *Chicago Junction Ry. Co.*, 156 F.

(2d) 357. The Court of Appeals disposed of it as follows (at page 360):

> "The only argument in favor of the injunctive relief against Junction is that such relief will not harm it. Heretofore that has not been a sufficient ground for an injunction."

**Reply to Section VII of Brief.**

In pages 44-52 of their brief, plaintiffs argue that even if the River Road trainmen have a valid contract to the disputed work, they should not be allowed to intervene because their remedy against the River Road for damages will not be affected by the injunction. This is only a minor variation of the point last discussed above that the trainmen might have work elsewhere, and thus not be legally damaged at all by the injunction. The *California Canneries* case, (279 U. S. 553), cited on page 44 of plaintiffs' brief, is not authority for either of these arguments. What that case primarily held is that an appeal in an Anti-Trust Act suit from an order denying intervention was not within the jurisdiction of the Court of Appeals, because such appeals must be taken direct to the United States Supreme Court under the Expediting Act. It is true that the opinion also stated that denial of intervention is not appealable at all unless the applicant has a "direct and immediate interest" in the suit, and thus the Court inferentially questioned whether the applicant for intervention in that case was entitled to intervene as of right. But this language in no manner prejudices the Brotherhood's right to intervene here. The Canneries had not been enjoined, while here an injunction directly against Brotherhood members is involved. More important, intervention of right is plainly provided by Federal statutes in our case, whereas no such statutes providing for intervention were involved

in the *Canneries* case. Lastly, that case involved a consent decree under the Anti-Trust Act which only rendered inoperative a contract between the defendant and the Canneries, which contract contained a specific escape clause authorizing the defendant to terminate it in the event of governmental action of the nature which was taken. The application to intervene was not made until more than two years after the entry of the consent decree. We have no such case here.

It is asserted on page 50 of plaintiffs' brief that we have cited no authority for the proposition that when A sues B to enforce an obligation from B to A, parties holding subsequent contracts with B which might be impaired by a judgment in favor of A have any right to intervene in the action. Of course this is purely hypothetical, because it does not describe the situation presented here. We have a suit by A to enjoin employer B *and employee C* from carrying out an employment contract between B and C. It is brought by A against B for an injunction against both B and C, but without naming employee C as a party. A brings the suit on the claim that the subject matter of the employment contract, *i. e.*, the work done thereunder, belongs exclusively to him. The nature of the suit is such that the employee C is specifically authorized by statute to protect his employment through intervention. Our brief is largely devoted to citation of authority in favor of the proposition that intervention is warranted in this situation.

Plaintiffs also assert in this section of their brief (pages 50-51) that the rate of $12.96 per car charged by the River Road for handling stock cars, as against $2.00 per car ($1.00 each way) for use of River Road tracks is a "highly profitable" charge, and would put the plaintiffs at a competitive disadvantage with the New York Central. This assertion, which at all events can obviously have nothing

whatever to do with the subject of intervention by the Brotherhood, is wholly without foundation in the record. It seems almost needless to say that no record references are mentioned in support of it. For all that the record shows, this rate, which is stated by the stipulation to have been fixed by the Chicago Switching Committee in 1945 (R. 55), may be unprofitable and burdensome to the railroad which handles such movements, for the River Road under this arrangement furnishes both the power and the crews. We think this assertion by plaintiffs, apparently addressed as it is to supposed general equities in their favor, is a red herring. The same observation may be made as to plaintiffs' additional intimation at this point in their brief that shippers in the Stock Yards might not get adequate service if the River Road trainmen handle the disputed movements. Plaintiffs make no record references on this subject either. We submit that both arguments should be disregarded.

**Reply to Section VIII of Brief.**

In pages 52-53 of their brief, plaintiffs argue that although direct injunctive relief is sought against River Road employees, that fact has no bearing on the question whether they should be allowed to become parties. The suggestion is made on page 53, apparently with all seriousness, that River Road trainmen, instead of entering this suit in defense of their work, should simply quit their jobs entirely, and thus free themselves of the binding effect of the injunction. Plaintiffs do not attempt to distinguish, in this connection, the case of *International Brotherhood* v. *Keystone Freight Lines*, 123 F. (2d) 326, previously cited by us, wherein the court said (page 329):

> " * * Plaintiff sought affirmative relief not only against the defendant companies but also against Intervenor and its members when it prayed for an in-

junction against defendants, their agents, servants, and employees. * * * Its right of intervention was not permissive, but absolute. * * *"

As for plaintiffs' suggestion (Br. 52) that Rule 65 (d) of the Rules of Civil Procedure authorizes the issuance of the injunction against the employees without their being made parties to the suit, the court said in the same case (page 330):

"Rule 65 (d) of the New Rules of Civil Procedure limits the binding effect of an injunction to the parties to the action, their officers, agents, servants, employees and attorneys, and to those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

"Here none of the elements necessary to bind one not a party to the action are present. Intervenor cannot be bound on the theory of representation nor because its members are servants of the defendant companies. The defendant companies do not represent Intervenor. Their interests are in conflict with those of Intervenor and its members. They discontinued their relations with Plaintiff because to continue them would lead to strife and strikes with the employees on account of the provision in the contract with the employees which forbade the defendant companies from handling merchandise of concerns classified as unfair to labor. The elements of representation or identity of interest between Intervenor and defendant companies are wholly absent, and Intervenor and its members may not be bound by the injunctive decree without being parties to the action."

## Reply to Section IX of Brief.

In pages 54-65 of their brief, plaintiffs undertake to show that the representation of whatever interest the River Road trainmen may have in this suit has been adequately made by the River Road.

As to the River Road's failure to urge the applicability of the Norris-LaGuardia Act against the injunction, plaintiffs argue (page 55) that this suit does not involve or grow out of a labor dispute because "Neither the plaintiffs nor the court are in any way concerned with the considerations which might have influenced the defendants to commit a breach of the order." This is no more than a statement that the plaintiffs do not care whether or not the suit involves or grew out of a labor dispute. It is certainly no answer to the broad definition of a suit involving or growing out of a labor dispute which is set forth in the Norris-LaGuardia Act. Quotations from that Act (29 U. S. C. A. Sec. 113) are as follows:

"Sec. 113. Definitions of terms and words used in chapter

"When used in sections 101-115 of this title, and for the purposes of such sections—(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; * * * whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers * * * and one or more employers * * * or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section)."

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation."

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment * * * regardless of whether or not the disputants stand in the proximate relation of employer and employee."

Plaintiffs' argument does not even touch the decisions decided under the Act, which we cited (Br. 29-31) in support of the proposition that where the subject matter of a suit by one carrier against another deals with the subject of a collective bargaining agreement between the defendant carrier and its employees, and disturbance of the relationship between the defendant and its employees is thereby threatened, the suit must be held to involve or grow out of a labor dispute. *Lee Way Motor Freight, Inc.* v. *Keystone Freight Lines, Inc.*, 126 F. (2d) 931 (10th Circuit 1942), certiorari denied in 317 U. S. 645; *Southeastern Motor Lines, Inc.* v. *Hoover Truck Company, Inc., et al.*, 34 F. Supp. 390 (D. C. Tenn., 1940).

These two cases also refute plaintiffs' argument that since the Norris-LaGuardia Act deals generally with injunctions in a labor dispute, it is inapplicable to a specific statute, such as the Interstate Commerce Act, which provides for injunctive relief. Both of the last cited cases were suits for injunctions brought under the Interstate Commerce Act, Chap. 8 (Motor Carrier Act).

As the court said in the *Lee Way* case, at 933:

"* * * whatever other remedies may or may not be available, there is nothing in the exactions of the Motor Carrier Act which operates to enlarge beyond the limitations of the Norris-LaGuardia Act the jurisdiction of a United States Court in respect to the issuance of a restraining order or a temporary or permanent injunction involving or growing out of a labor dispute."

The case of *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, relied on by plaintiffs (Br. 56), is easily distinguishable from our case. In the *Virginian* case relief was sought under Section 2, Ninth, of the Railway Labor Act (45 U. S. C. A. section 152), dealing with the particular type of labor dispute which was involved in that case between the carrier and its employees. The railroad attached the decree in that case both under the Railway Labor Act and the Norris-LaGuardia Act. The Court held that the railroad had shown no violation of either statute. Specifically referring to the railroad's objections that the Norris-LaGuardia Act had been violated by issuance of the injunction, the Court said (at page 563):

> "* * * they are based on strained and unnatural constructions of the words of the Norris-LaGuardia Act, and conflict with its declared purpose * * *"

The Court did not find that there was any conflict between the Railway Labor Act and the Norris-LaGuardia Act. And in the later case of *Brotherhood* v. *Toledo, Peoria & Western*, 321 U. S. 50, it was expressly held (page 58) that there is a "basic common policy" between the two statutes.

Plaintiffs further argue (Br. 59) that the Norris-LaGuardia Act is inapplicable because this is a suit brought by the United States, acting through the Interstate Commerce Commission, within the meaning of the rule announced in *United States* v. *United Mine Workers of America*, 67 S. Ct. 677. The provision of the Interstate Commerce Act under which this suit was brought (49 U. S. C. A. section 16 (12)) is that:

> "* * * the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney-General, may apply to any District Court of the United States of competent jurisdiction for the enforcement of such order."

This provision in itself clearly distinguishes the Commission from the United States. The Commission did not institute this suit, as plaintiff carriers infer on page 60 of their brief. It was only permitted to intervene, which it did not even purport to do on behalf of the United States, but did so only for itself, as is plainly shown by its complaint of intervention (R. 47-49). The Commission did not substitute itself for the railroads which brought this suit; it merely added itself to them as an intervening plaintiff. The United States, whose interests in interstate commerce cases are required under the Judicial Code (Sections 212, 213 (28 U. S. C. A. section 45 a)) to be represented by the Attorney General, is clearly not a party to this suit. The rule in the *Mine Workers* case that an injunction sought by the United States in a labor dispute with its employees is outside the scope of the limitations of the Norris-La-Guardia Act obviously cannot be extended to cover a case in which the dispute is between private employers and private employees and the United States is not even a party to the case.

At this point we believe it appropriate to comment briefly on the attempt made by plaintiff carriers to create the impression in this part of their brief that their efforts to prevent the River Road trainmen from having their day in court in this case are made in the public interest. As pointed out above, the only public body in this suit is the Commission, and it does not purport to represent the United States. If any party to this suit can assume to speak in the public interest, it is the Commission, and not the plaintiff carriers. *The Commission did not oppose the Brotherhood's application for intervention.* Counsel for the Commission stated that the Commission took a "neutral" position with respect to intervention by the Brotherhood (R. 135).

No cloak of pretended authority to speak for others can hide the fact that the plaintiff carriers represent only themselves in this case, and that their desire to exclude the River Road trainmen from participating herein is motivated by nothing nobler than the plaintiff carriers' selfish interest.

## Conclusion.

Plaintiffs have not advanced any sound reason for denial of the Brotherhood's application for intervention, as a matter of right, and such intervention should have been granted on each of the following grounds:

The Brotherhood is an indispensable party;

Federal statutes confer upon the Brotherhood an unconditional right to intervene;

The employees represented by the Brotherhood are or may be bound by a judgment in the action, and the representation of their interest by existing parties is or may be inadequate.

Respectfully submitted,

BURKE WILLIAMSON,
JACK A. WILLIAMSON,
*Attorneys for Appellant,*
39 South La Salle Street,
Chicago 3, Illinois.

ADAMS NELSON & WILLIAMSON,
*Of Counsel,*
39 South La Salle Street,
Chicago 3, Illinois.

May 3, 1947.